

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission	:	
On its Own Motion	:	
	:	Docket No. 12-0457
	:	
Development and adoption of rules	:	
concerning rate case treatment of	:	
charitable contributions	:	

**REPLY BRIEF ON EXCEPTIONS,
RESPONSE IN OPPOSITION TO AMEREN ILLINOIS COMPANY'S MOTION FOR
ORAL ARGUMENT,
AND MOTION FOR STAY
OF THE STAFF
OF THE ILLINOIS COMMERCE COMMISSION**

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Pursuant to Section 200.800 of the Illinois Commerce Commission’s (“Commission” or “ICC”) Rules of Practice (83 Ill. Adm. Code 200.800), Staff of the Illinois Commerce Commission (“Staff”), by and through its undersigned counsel, respectfully submits its Reply Brief on Exceptions, Response in opposition to Ameren Illinois Company’s (“Ameren”) Motion for Oral Argument, and Motion for Stay in the above-captioned proceeding.

I. BACKGROUND

In an Initiating Order dated July 31, 2012, the Commission initiated a proceeding to allow all interested parties an opportunity to present ideas and language that will assist the Commission in formulating a policy on the issue of charitable contributions. (Illinois Commerce Commission On its Own Motion, ICC Order Docket No. 12-0457, 2 (July 31, 2012) (“Initiating Order”).) The purpose of this rulemaking proceeding is to

provide a higher standard of information for future initial rate filings to ensure that when rate payers are asked to pay for charitable contributions made by the utility, the review of the prudence of those contributions can be sufficient. (Initiating Order, 1, citing Commonwealth Edison Company, ICC Order Docket No. 11-0721, 99 (May 29, 2012).

The following parties have intervened: Integrys Business Support, LLC, Exelon Business Services Company, Northern Illinois Gas Company d/b/a Nicor Gas Company (“Nicor”), North Shore Gas Company and The Peoples Gas Light and Coke Company (“North Shore/Peoples” or “NS/PG”), Mt. Carmel Public Utility Co., the People of the State of Illinois, Ameren Illinois Company d/b/a Ameren Illinois (“Ameren”), Commonwealth Edison Company (“ComEd”), Citizens Utility Board (“CUB”), Aqua Illinois, Inc., Illinois-American Water Company (“IAWC”), Integrys Energy Group, Inc., MidAmerican Energy Company (“MidAmerican”), and Ameren Services Company. Staff conducted several workshops in both Chicago and Springfield, and Staff circulated several drafts of the Proposed Rule upon which parties informally commented.

On May 22, 2014, Staff filed a Proposed Rule and Verified Comments addressing comments received by the parties during the informal workshop and comment process. On September 18, 2014, MidAmerican, North Shore/Peoples, Ameren, CUB, Nicor, ComEd, and IAWC each filed their respective Verified Initial Comments. Pursuant to the schedule set by the Administrative Law Judge (“ALJ”), Staff filed Verified Reply Comments on November 7, 2014. On November 7, 2014, Ameren, ComEd, and Nicor filed Verified Reply Comments. On November 7, 2014, CUB filed Reply Comments. On December 9, 2014, the ALJ conducted a hearing and entered all the verified comments into the record. On January 29, 2015, Staff filed a Draft

Proposed Order. On January 29, 2015, ComEd, CUB, North Shore/Peoples, and MidAmerican also filed separate Draft Suggested Orders.

The ALJ issued the Proposed Order on March 11, 2015. The ALJ's Proposed Order achieves an appropriate higher standard of information for future initial rate filings to ensure that when rate payers are asked to pay for charitable contributions made by the utility, the review of the prudence of those contributions can be sufficient, is sound in its reasoning, and should be adopted by the Commission in this proceeding. On March 25, 2015, Staff filed a short Brief on Exceptions ("BOE") in support of the ALJ's Proposed Order, but offering a couple of technical corrections for clarification purposes. On March 25, 2015, the following parties also filed BOEs: Ameren, North Shore/Peoples, Nicor, ComEd and MidAmerican. Staff now hereby files this Reply Brief on Exceptions ("RBOE"), Response in Opposition to Ameren's Motion for Oral Argument, and a Motion for Stay.

II. REPLY TO EXCEPTIONS

The Proposed Order reviews the issues presented in this proceeding in a clear and concise manner, is well written, and accurately reflects the positions taken by Staff and the intervening parties. Staff supports the Proposed Order's conclusions and offers only the following responses to exceptions taken by other parties in this proceedings. Failure to address any specific arguments raised in the BOEs should not be considered concession of that argument or issue. Staff continues to take the positions on these issues that it has taken in its prior filings.

A. Section 325.110 Definitions – Management
(ComEd)

In its BOE, ComEd argues that the definition is overly-broad for what ComEd believes is the intent of the provision: “to encompass only those individuals who have approval authority over charitable contributions.” ComEd BOE, 3-5. Staff disagrees. The Proposed Order properly found that including all those individuals that participate in the selection or approval of public utility donations is necessary to meet the intended purpose of the definition, as well as the intended purpose of this proceeding to provide the Commission with a “higher standard of information” regarding these contributions. PO, 6. The purpose of the definition is to define those individuals that have influence over the decision making process to determine which organizations receive rate-payer funded donations. It is possible for an individual, without approval authority, to have significant influence over the decision making process regarding donations. Limiting the definition of management to those individuals with approval authority may not capture individuals with significant influence over, and participation in, the decision making process. Many boards recruit members with the understanding that recruited members have a fiduciary responsibility to secure a certain level of donations for the organization. Often times these donations are collected from the recruited members’ employer. It is reasonable for the Commission to have the full scope of the facts and circumstances of those situations when rate-payers are funding the donations.

Limiting the list of those included in the definition to only the one or few with approval authority would improperly limit the information available to the Commission. Similarly, each utility’s employee structures differ from one another and could change within a single utility at any given time. Limiting the term “management” to only

“managers” instead of “employees” would also result in the Commission having less information, and should also be rejected.

ComEd also argues that requiring all individuals who participate in the approval or selection in the list required pursuant to Section 325.120 would be overly burdensome. ComEd BOE, 3-5; ComEd Verified Initial Comments at 3. Staff similarly disagrees. The information provided would indeed be useful for the Commission in determining whether the donation was reasonable in amount, and should be relatively easily provided, as those employees participating in the process of selecting or approving a public utility donation could self-report to the utility. See ComEd Verified Initial Comment at 3-4. For instance, if a utility made unusually large donations only to those entities for which employees participating in the approval or selection of a public utility donation, then the Commission could consider whether those influences were contributing to what may be determined to be unreasonably large donations.

For all the reasons discussed above, the Commission should reject ComEd’s proposed amendments to the definition of “management,” and instead adopt the Proposed Order’s definition. PO, 6; Staff Verified Initial Comments, Attachment A at 3; Staff Verified Reply Comments, 2-5.

B. Section 325.120 Supplemental Information
(Ameren, North Shore/Peoples, ComEd, Nicor, MidAmerican)

The Proposed Order was correct in finding that the Supplemental Information subject to Section 325.120 is relevant to determining the prudence and reasonability of contributions and whether the donations are consistent with the requirements of the Act. PO, 14. The Commission should adopt the Proposed Order position on this issue. This subsection establishes that the utility must provide a description of why the donor utility

believes the charitable contribution amount is reasonable for all charitable contributions to a single entity or organization that total \$1,000 or more in the reporting year for which a utility is seeking recovery from ratepayers in a rate case. The Proposed Order properly reasons that without specific information regarding each substantial donation, the Commission cannot intelligently make the determination of whether the millions of dollars of ratepayer money that utilities donate to charities has been reasonably and prudently spent. PO, 13.

In taking exception to the Proposed Order's adoption of Section 325.120(a)(3), some utilities seek to strike this section. Ameren, for example, expresses concern that the language may lend itself to parties challenging the reasonableness of individual charitable contribution amounts in a manner not contemplated by the legislature or interpreted by courts. (Ameren BOE, 3-4.) North Shore/Peoples state that it is contrary to Section 9-227, contrary to legal precedent, and impractical in a future test year rate case. North Shore/Peoples BOE, 2. Nicor states the provision does not comport with Section 9-227 in requiring information about the reasonableness of individual donations. Nicor BOE, 3-5. ComEd asserts that the provision conflicts with legal precedent. ComEd BOE, 6-7. MidAmerican argues that the Proposed Order does not address the Illinois Supreme Court's reasoning on this matter. Ameren BOE, 2. Staff disagrees.

The Proposed Order properly interprets and applies the Illinois Supreme Court ruling in Business and Professional People for the Public Interest v. Illinois Commerce Comm'n, 146 Ill. 2d 175, 254 (1991) ("BPI"), and it correctly finds that BPI supported the Supplemental Information requirement as a common sense approach to assessing reasonableness and prudence. PO, 13-14. Moreover, the Proposed Rule's limited

application to substantial donations, delineated at a threshold amount of \$1,000 or more, should assuage the utilities' concerns of being an overly burdensome approach. The Proposed Order properly explains that Subsection 325.120(a)(3) establishes that the utility must provide a description of why the donor utility believes the charitable contribution amount is reasonable for all charitable contributions to a single entity or organization that total \$1,000 or more in the reporting year for which a utility is seeking recovery from ratepayers in a rate case. PO, 13; Staff Verified Initial Comments, Attachment A at 3. The utilities above are incorrect in their assertion that the Commission must determine the reasonableness of donations based solely on the aggregate amount of donations.

In BPI, the Court did not indicate that in considering whether to allow a utility's charitable contribution to be recovered as an operating expense, the Commission was limited in any way to what it could review or that the Commission could not consider whether the utility provided any support for whether a particular donation was reasonable under Section 9-227. Rather, to the contrary, the Court explained that in the case before them, there was no evidence of particularized donations, and the utility witness had only testified in terms of total contributions, and therefore, without that information, it was impossible in that case to determine if each individual donation were reasonable in amount. Id. The proposed rule would remedy this insufficiency in information up front in the process. The evidence provided by the utility must support its claim of prudence and reasonableness. To allow otherwise would be illogical and improperly tie the hands of the Commission. Indeed, the Proposed Order correctly

points out that the aggregate amount is only one component of the determination of what donation costs can be absorbed by ratepayers. PO, 13.

Moreover, the Proposed Order properly explains that the rulemaking was initiated by the Commission due to its concern regarding the quality of data provided in compliance with 83 Ill. Adm. Code 285.3070 Schedule C-7, Charitable Contributions. PO, 13; ICC Order Docket No. 12-0457 (July 31, 2012). In the Commission language below, the Commission stated its concern in terms of the quality and detail of individual donations:

The Commission is concerned that the information provided by the Company in its initial filing is barely sufficient for the Commission to evaluate prudence of these contributions, and even the information provided on rebuttal is inconsistent in quality and detail, and thus not always of use to the Commission. The Commission therefore orders that a rulemaking be initiated to provide a higher standard of information for future filings to ensure that when rate payers are asked to pay for charitable contributions made by the utility, the review of the prudence of those contributions can be sufficient. Descriptions of the purpose of each contribution should be contained in the initial filing in order to have a complete record, and further those descriptions should describe of the purpose of the contribution, not merely a generic description of the organization being supported.

ComEd, ICC Docket No. 11-0721, Order at 99 (May 29, 2012) (emphasis added). The Proposed Order properly reasoned that the Commission has been dissatisfied with the level of information provided in support of these contributions, noting that it is barely sufficient for the Commission to evaluate prudence of these contributions. PO, 13. The Proposed Order is also correct in the assessment that descriptions of the purpose of each contribution should be articulated in the initial filing in order to demonstrate that the aggregate amount is reasonable. PO, 14.

Regarding North Shore/Peoples' assertion that this Supplemental Information requirement is not appropriate for a future test year, that is not supportable. North Shore/Peoples states that in a future test year rate case, the utility is not seeking recovery of specific donations to specific organizations. Rather the utility shows recent historical data and a forecast of expected total donations in a test year. North Shore/Peoples BOE, 3-4. While at initial blush, this may seem like a valid consideration, even NS/PG admits that the historical data showing specific contributions to specific organizations are instructive. NS/PG BOE, 4. The fact is that even these future test year estimate amounts are based upon expected contributions. It is reasonable to expect those to be substantiated with basic information to assist the Commission in evaluating the prudence and reasonableness of charitable contributions. As NS/PG is aware, the Commission need only *consider* Section 9-227 donations as an operating expense. There is no guarantee of recovery unless such donations meet the statutory requirements and are reasonable in amount. The supplemental information assists the Commission in making that assessment.

Finally, Ameren argues that challenges to the reasonableness of an expenditure would lead to attempts to compare or benchmark individual donations with other individual donations and assessments of whether "one donee or cause is 'worthy' of more funding this year than last." (Ameren BOE, 4; Ameren Initial Comments at 3.) Such speculation is unfounded. The proposed rule merely provides an opportunity for a utility to explain to Staff and the Commission why it believes that the charitable contribution amount is reasonable. There is no duty to compare with other proposed amounts. Additionally, Ameren's concern that this information would be "awkward and

obtuse for the Commission” is misplaced. Id. The information is relevant to the inquiry of prudence and would serve to provide an added measure of assurance to consumers that their utility rates are being invested in an appropriate manner consistent with the requirements under the Act and the intentions of the General Assembly that these donations may be considered. These are not automatic pass-throughs. The higher standard of information provided will better enable more thorough considerations. Staff Verified Reply Comments, 5-10.

**C. Section 325.130 Information to be made available
(Ameren)**

This section establishes that the utility seeking recovery must provide certain materials electronically to Commission Staff upon request. This section helps to provide a higher standard of information in future initial rate filings to ensure that when rate payers are asked to pay for charitable contributions made by the utility, the review of the prudence of those contributions can be sufficient. The Proposed Order properly found that this section will help enable the Commission to determine the prudence of charitable contributions made by the utility with ratepayer funds. PO, 15.

Ameren states in its BOE that it is unclear whether there is a threshold amount intended to trigger the requirements of Subsection 325.130(l). (Ameren BOE, 6-7). Ameren suggests a threshold amount of \$1,000. Id., at 7. Staff disagrees. Section 325.130(1) of the proposed rule is essentially requesting the same information required by the Internal Revenue Service (“IRS”) to substantiate a charitable contribution deduction. The threshold used by the IRS to substantiate a charitable contribution for a tax deduction is \$250. The Commission must be able to ensure charitable contributions submitted for recovery have indeed been made, have been made to an eligible entity,

and are properly recoverable under the Act. Section 325.130 allows Staff to request that basic information for any and all contributions submitted for recovery, as is proper. In addition, the Commission has the authority to request supporting documentation regardless of the dollar amounts involved. A \$1,000 threshold would improperly limit the information gathering ability of Staff, the record available to the Commission to make a reasoned decision, and, ultimately, the Commission's investigative authority. Therefore, the Proposed Order was correct to reject Ameren's proposal to set a threshold limit to this requirement, and the Commission should also reject it. PO, 15; Staff Verified Reply Comments, 10-11.

D. Section 325.140 Required Disclosures
(Nicor, ComEd, Ameren)

The Proposed Order properly found that this provision is consistent with the purpose of this rulemaking proceeding and that its requirements increase transparency and fairness. PO, 27. Nicor and ComEd both take exception to Section 325.140, stating that the disclosure requirements reflected in Section 325.140 have no bearing on the determination of whether charitable contributions are reasonable. Nicor BOE, 7-8; ComEd BOE, 8. Staff disagrees. The Commission is charged with ensuring that rates are just and reasonable and consistent with the requirements under the Act. To the extent any utility is unwilling or unable to provide some basic level of transparency to either the donee organization or its customers, the Commission should take that information into account in determining whether the donation was prudent and whether it qualified as a charitable contribution that will be recoverable in rates. Unwillingness to attribute credit to those ultimately funding the donations could be an indication of a purpose separate and apart from charity itself such as promotional advertisement and

goodwill, neither of which may be recoverable as a charitable contribution. 220 ILCS 5/9-224, 5/9-225. Regardless of the reason for the reluctance on the part of utilities, the Commission has an obligation to ensure ratepayers receive just and reasonable rates. Encouraging utility transparency furthers that interest.

If a utility was unwilling to disclose and justify the charitable contribution expense to those who would be funding the expense (ratepayers) after the Commission had found that expense recoverable, then it calls into question whether the utility itself believes the donation was prudent, which is relevant as a factor the Commission has the discretion to consider in making its own determination of prudence. Therefore, the requirement falls well within the scope of this proceeding, and should be retained. (Staff Verified Initial Comments, Attachment A at 5-6.) Nicor's concerns here are unfounded.

In its BOE, Ameren improperly raises a new frivolous issue. Ameren did not raise this new Constitutional argument in its Initial Verified Comments, did not raise it or any related concerns in its Reply Verified Comments, and failed to file a Draft Proposed Order in this docket in which it could have proposed draft language. Without offering any new facts or circumstances necessitating additional argument, Ameren alleges for the first time that the Section 345.140 violates the First Amendment of the United States Constitution by (1) forcing utilities to disseminate views to conform with an agenda that it has not set and (2) burdens expression by compelling access to utility property for a message with which the utilities may disagree. (Ameren BOE, 10.) This is absurd on its face. Aside from the untimeliness of this allegation, the "views" utilities would be disclosing are those initiated by the utilities themselves – mere disclosure of how the ratepayer money is being spent. It is unclear what Ameren means by burdening

expression by compelling access to utility property for a message that the utilities may disagree with, when, again, it would be the utilities themselves that would be initiating the expenditure of ratepayer money for the purpose of making a Section 9-227 donation. Ameren's late to the table assertions here should be dismissed outright as procedurally improper and factually inaccurate. That portion of its BOE, at pages 9-12, should be stricken, and Staff herein so moves pursuant to Rule 200.190 of the Commission's Rules. 83 Ill Adm. Code 200.190.

To the extent that the Commission may choose to address it, however, Staff does so herein. As noted above, the purpose of this rulemaking proceeding is to provide a higher standard of information for future initial rate filings to ensure that when rate payers are asked to pay for charitable contributions made by the utility, the review of the prudence of those contributions can be sufficient. (Initiating Order, 1, citing Commonwealth Edison Company, ICC Order Docket No. 11-0721, 99 (May 29, 2012). The Commission has discretion in assessing the prudence of the contributions. One of the considerations in making such an assessment is the transparency of the process. Indeed, such transparency is critical to the key goal of the Commission to ensure that ratepayer funds are donated to charities that adequately serve ratepayers. See, Commonwealth Edison Company, ICC Order Docket No. 11-0721, 98 (May 29, 2012). Section 325.140 helps achieve this goal. It requires for all individual donations to a single entity or organization that equal \$10,000 or more for which a utility may seek recovery as charitable contributions from ratepayers, transparency in the process in the form of disclosures to the recipient as well as the ratepayers. It in no way seeks to violate a utility or donee's freedom of speech as Ameren asserts. Ameren BOE, 10. To

the contrary, the Proposed Rule does not require a utility to force any speech that the utility itself has not initiated. Indeed, under Ameren's approach, it is the ratepayers who are forced to associate with, financially support, and by extension speak for and on behalf of organizations which may be objectionable to their own personal beliefs.

Ameren cites to Central Illinois Light Company v. Citizens Utility Board, 827 F.2d 1169 (7th Cir. 1987) (hereinafter, "Central Illinois"), in support of its position. That case is distinguishable from the Proposed Rule language. In the Central Illinois case, the Court said that:

the statutory scheme created by Section 9 of the [Public Utilities] Act, in conjunction with Section 10, is, in all material respects, constitutionally indistinguishable from the CPUC order struck down by the Court in Pacific Gas. In both instances, the government has selected a speaker on the basis of its views, and the utilities are forced to disseminate the views of that speaker with which they disagree and to associate themselves with that speaker and its views. In both cases, the utilities' freedom of speech is burdened because they are compelled to give access to their billing materials to a group that regularly opposes them in regulatory proceedings. Finally, in both cases, the utilities are compelled to use their billing materials to convey messages with which they disagree.

Id., at 1174 (emphasis added). In that case, the Court affirmed a finding that "forced access" provisions of the Citizens' Utility Board Act violated the First Amendment because that Act permitted CUB to solicit membership and membership dues through envelope enclosures mailed by utilities along with their regular billings. Id. In this Proposed Rule, however, there is no forced intrusion on utility property for the use of the public, or some third party litigant, as was the case in Central Illinois. Rather, it is the utility itself that initiates both the decision to make a donation, and to request that it be

collected from ratepayers pursuant to Section 9-227 of the Act. The Commission has an obligation to ensure that the rates a utility charges ratepayers are just and reasonable, and not misleading. In that capacity, the Commission has in the past reviewed language of billing inserts as well as bills and ordered changes. MCI Telecommunications Corporation, et al. v. Illinois Bell Telephone Company d/b/a Ameritech Illinois, 96-0075, Sprint Communications Company v. Illinois Bell Telephone Company, 96-0084 (consolidated), ICC Order, 1996 WL 33659909 (April 3, 1996). Commonwealth Edison Company Petition for permission to deviate from the definitions or explanations provision of 83 Illinois Administrative Code Section 410.350 (a)(1)(D), Docket No. 88-0128, ICC Order, 1988 WL 1533547 (June 29, 1988) (Commission ordering message to appear on monthly bills). The Peoples Gas Light and Coke Company and North Shore Gas Company Joint Petition for Permission to Deviate from the Definitions or Explanations Provision of 83 Illinois Administrative Code Section 500.330(a)(1)(D), Docket No. 88-0255, ICC Order, 1988 WL 1533652 (October 12, 1988) (Petitioners required to provide an explanatory insert to their customers at least three times annually). See also, Commonwealth Edison Company, Proposal to establish Ricer PORCB (Purchase of Receivables with Consolidated Billing) and to revise other related tariffs. (Tariffs filed on January 20, 2010), Docket No. 10-0138, Proposed Order, 2010 WL 4912327 (October 7, 2010) (declining to assert authority to require billing insert).

In the normal course of its regulatory authority, the regulator may require the utility to disclose matters that it may prefer not to disclose. Indeed, by extension under Ameren's logic, it should not have to post a rate schedule or get approvals for rate

changes if it disagrees with the Commission's findings. Whether a utility agrees or not, required disclosures and transparency is a critical aspect of ensuring that rates are just and reasonable. The suggestion that such basic disclosures are akin to forcing a utility to use its property to promote another entity's interest does not comport, particularly when it is the utility itself that is voluntarily initiating the donation, as well as its treatment as an operating expense, in the first place, as would be the case here.

The Commission should adopt the Proposed Order's finding on this issue. PO, 26-27.

E. Ameren's Alternative Recommended Revisions to Section 325.140.

In its BOE, Ameren raises alternative language, alleging that subsection (a) "reads as an attempt to shift 'blame' to the utilities for seeking to recover costs that the legislature has expressly deemed eligible for potential inclusion in rates as legitimate operating expenses." (Ameren BOE, 13.) Staff disagrees. Section 325.140 would require utilities to provide information to customers related to charitable contributions and the donee organizations themselves, thereby increasing transparency and imposing a higher standard of information – information to donees and ratepayers as well as the Commission. (Staff Verified Initial Comments, Attachment A at 5-6.) This higher standard of information is precisely the subject of this docket. Initiating Order at 1.

Ameren's proposed alternative language should be rejected. Specifically, addressing subsection (a) (3), regarding a written statement indicating that the recoverability of such cost is subject to approval by the Commission, that suggested statement would be redundant. The language in (2) states that the utility may seek

recovery of the costs, which, by definition, suggest that that recovery is subject to approval.

With respect to the suggested alternative language to current (3), Ameren proposed paragraph (4):

A written request by the utility that any public recognition given by the entity or organization to the utility for a charitable contribution from the utility should specify in a clearly visible format the following: “[Utility Name] has requested, or may request, that, to the extent allowed by Illinois law ~~and approved by the Illinois Commerce Commission~~, the donation ~~may~~ be funded by customers of [insert name of the donor utility].”

Staff does not object to the addition of the language “or may request,” as reflected above. Staff does object, however, to the addition of the language “and approved by the Illinois commerce Commission” as redundant and already incorporated in the language “to the extent allowed by Illinois law.” Staff does not object to removing the word “may” at the end of the paragraph if the words “or may request” are added as delineated above.

F. Section 325.160 Utility Certifications
(Ameren)

Ameren in its BOE again brings up a new issue not raised below, alleging that Section 325.160 “misrepresents slightly the applicable standards contained in Section 9-225 and presents several additional practical problems.” (Ameren BOE, 17.) As these are new arguments, not raised in either its Verified Initial Comments or Verified Reply Comments, this section of Ameren’s BOE, at pages 17-18, should also be stricken, and Staff does hereby so move, pursuant to Rule 200.190, 83 Ill. Adm. Code 200.190.

To the extent that the Commission may decide to address this, however, Staff points out that Ameren’s apparent new quandary over who within the organization could

possibly sign such a certification is mere semantics. Such antics should not override the intended purpose of this increased transparency.

As stated repeatedly in this proceeding, this section is intended to ensure consistency with the Act and to prevent any duplication of rate recovery or any prohibited recovery through rates. Specifically, the section establishes that in connection with any donation by a participating utility, as defined in Section 16-108.5(b-10) of the Act, the participating utility shall, in its formula rate filings under Section 16-108.5 of the Act, provide to Staff a sworn statement that none of the donations made in compliance with the requirements of Section 16-108.5(b-10) are included in the request for rate recovery, and in connection with any charitable contribution by a public utility, the public utility in its rate case must provide to Staff a certification that the charitable contribution does not have: (i) a lobbying, political, or any other election related purpose pursuant to Section 9-224 of the Act, 220 ILCS 5/9-224, or (ii) a promotional, political, institutional or goodwill advertising related purpose pursuant to Section 9-225 of the Act, 220 ILCS 5/9-225. This provision is necessary in order to ensure that any related rate recovery conforms to the Act and that the review of the prudence of the contributions can be sufficient. Staff Verified Comments, 5-6.

In past rate cases, there has been a very fine line between what has constituted donations and sponsorships, promotional, political, institutional, or goodwill advertising, political activity and lobbying. The utilities' portrayal of the expense categories of advertising and political and lobbying as separate and distinct items from this rulemaking, and therefore unrelated to charitable contributions, is contrary to events in prior cases. The Commission has expressed concerns regarding a utility's substitution

of a challenged expense (for example, as promotional advertising) addressed in one of those separate and distinct sections of the Act, to find that the company then attempted to recover the expense as a charitable contribution. The Commission's understandable concern is expressed in Docket No. 13-0301:

While the Commission agrees that in the majority of instances the expenses are recoverable, a number of the listed expenses appear to have no purpose other than promotional, goodwill, and/or institutional advertising. Undoubtedly, AIC will claim that the disallowed expenses are recoverable charitable donations under Section 9-227. The overall problem with AIC's analysis, however, is that it gives no meaning to the prohibition in Section 9-225 of recovery of promotional, goodwill, and/or institutional advertising. Surely the legislature did not intend for certain expenses to be unrecoverable under Section 9-225, only to allow all such expenses to then be deemed recoverable under Section 9-227.

Ameren Illinois Company, ICC Docket No. 13-0301, Order at 77 (December 9, 2013).

Ameren now asserts that because the Section 9-225 prohibition is qualified, a modification is required to Section 325.160. (Ameren BOE, 17-18.) Staff disagrees. The purpose of Section 325.160 is to ensure consistency with the Act and to prevent any duplication of rate recovery or any prohibited recovery through rates. Ameren's proposed addition to the rule to add "and not eligible for recovery under the same" as proposed on page 17 of its BOE serves no purpose and misses the point of the provision. The idea is to avoid double recovery – not to allow it in both places if it is allowable in 9-225.

The Commission is looking to this rulemaking to provide guidance to remedy the very type of situation about which it had been concerned. Since the Commission is concerned with ensuring adherence to the statute, requiring a certification from a utility that its donations are not a type of unallowable expense is entirely reasonable. It is now a necessary step to enable the Commission to properly regulate the public utilities in

Illinois and properly administer the regulatory laws under the Act. The certification required in this section provides the guidance the Commission requested in Docket Nos. 12-0511/12-0512 (Cons.), and it does so in a manner that does not render Section 9-225 of the Act meaningless. This higher standard of information is in the public interest because it protects the ratepayers against any improper allocations or double recovery, and would remove incentives for potential fraud, abuse, or inadvertent error. The Commission may adopt reasonable and proper rules and regulations relative to the exercise of its powers and functions. Alhambra-Grantfork Telephone Co. v. ICC, 358 Ill. App. 3rd 818, 832 (5th Dist. 2005). Staff recommends that it do so here. Staff Verified Reply Comments, 18-21. As such, Ameren's proposed amendments should be rejected.

III. RESPONSE IN OPPOSITION TO AMEREN'S MOTION FOR ORAL ARGUMENT

Staff does not see any benefit in an oral argument and recommends that Ameren's request be denied. The contested and uncontested issues have been thoroughly vetted throughout the workshop and comment hearing phases of this proceeding. With its motion, and as explained above in Staff's RBOE Section II, Ameren now improperly raises a new frivolous issue after the fact. Ameren did not raise this new Constitutional argument in its Initial Verified Comments, did not raise it or any related concerns in its Reply Verified Comments, and failed to file a Draft Proposed Order in this docket in which it could have proposed draft language. Now with its BOE, and without offering any new facts or circumstances necessitating additional argument, Ameren alleges that "some portions [of the proposed rule], namely Section 325.140 of

the rule, have absolutely nothing to do with providing information. . .” Ameren Motion, 1. In so doing, Ameren alleges for the first time that the section violates the First Amendment of the United States Constitution by (1) forcing utilities to disseminate views to conform with an agenda that it has not set and (2) burdens expression by compelling access to utility property for a message with which the utilities may disagree. Ameren Motion, 2, incorporating Ameren BOE, 10. This is absurd on its face. Aside from the untimeliness of this allegation, the “views” utilities would be disclosing are those initiated by the utilities themselves – mere disclosure of how the ratepayer money is being spent. It is unclear what Ameren means by burdening expression by compelling access to utility property for a message that the utilities may disagree with, when, again, it would be the utilities themselves that would be initiating the expenditure of ratepayer money for the purpose of making a Section 9-227 donation. As noted above, Ameren’s late to the table assertions here should be dismissed outright as procedurally improper and factually inaccurate.

It bears repeating that the purpose of this rulemaking proceeding is to provide a higher standard of information for future initial rate filings to ensure that when rate payers are asked to pay for charitable contributions made by the utility, the review of the prudence of those contributions can be sufficient. (Initiating Order, 1, *citing Commonwealth Edison Company*, ICC Order Docket No. 11-0721, 99 (May 29, 2012). The Commission has discretion in assessing the prudence of the contributions. One of the considerations in making such an assessment is the transparency of the process. Indeed, such transparency is critical to a key goal of the Commission to ensure that

ratepayer funds are donated to charities that adequately serve ratepayers. See, Commonwealth Edison Company, ICC Order Docket No. 11-0721, 98 (May 29, 2012).

Section 325.140 helps achieve this goal. It requires for all individual donations to a single entity or organization that equal \$10,000 or more for which a utility may seek recovery as charitable contributions from ratepayers, transparency in the process in the form of disclosures to the recipient as well as the ratepayers. It in no way seeks to violate a utility or donee's freedom of speech as Ameren asserts. Motion, 2. To the contrary, the Proposed Rule does not require a utility to force any speech that the utility itself has not initiated.

Ameren cites to Central Illinois Light Company v. Citizens Utility Board, 827 F.2d 1169 (7th Cir. 1987) (*hereinafter*, "Central Illinois"), in support of its position. That case is distinguishable from the Proposed Rule language. In the Central Illinois case, the Court said that:

the statutory scheme created by Section 9 of the [Public Utilities] Act, in conjunction with Section 10, is, in all material respects, constitutionally indistinguishable from the CPUC order struck down by the Court in Pacific Gas. In both instances, the government has selected a speaker on the basis of its views, and the utilities are forced to disseminate the views of that speaker with which they disagree and to associate themselves with that speaker and its views. In both cases, the utilities' freedom of speech is burdened because they are **compelled to give access to their billing materials to a group that regularly opposes them in regulatory proceedings**. Finally, in both cases, the utilities are compelled to use their billing materials to convey messages with which they disagree.

Id., at 1174 (emphasis added). In that case, the Court affirmed a finding that "forced access" provisions of the Citizens' Utility Board Act violated the First Amendment because that Act permitted CUB to solicit membership and membership dues through

envelope enclosures mailed by utilities along with their regular billings. Id. In this Proposed Rule, however, there is no forced intrusion on utility property for the use of the public, or some third party litigant, as was the case in Central Illinois. Rather, it is the utility itself that initiates both the decision to make a donation, and to request that it be collected from ratepayers pursuant to Section 9-227 of the Act. The Commission has an obligation to ensure that the rates a utility charges ratepayers are just and reasonable, and not misleading. In that capacity, the Commission has in the past reviewed language of billing inserts as well as bills and ordered changes. MCI Telecommunications Corporation, et al. v. Illinois Bell Telephone Company d/b/a Ameritech Illinois, 96-0075, Sprint Communications Company v. Illinois Bell Telephone Company, 96-0084 (consolidated), ICC Order, 1996 WL 33659909 (April 3, 1996). Commonwealth Edison Company Petition for permission to deviate from the definitions or explanations provision of 83 Illinois Administrative Code Section 410.350 (a)(1)(D), Docket No. 88-0128, ICC Order, 1988 WL 1533547 (June 29, 1988) (Commission ordering message to appear on monthly bills). The Peoples Gas Light and Coke Company and North Shore Gas Company Joint Petition for Permission to Deviate from the Definitions or Explanations Provision of 83 Illinois Administrative Code Section 500.330(a)(1)(D), Docket No. 88-0255, ICC Order, 1988 WL 1533652 (October 12, 1988) (Petitioners required to provide an explanatory insert to their customers at least three times annually). See *also*, Commonwealth Edison Company, Proposal to establish Ricer PORCB (Purchase of Receivables with Consolidated Billing) and to revise other related tariffs. (Tariffs filed on January 20, 2010), Docket No. 10-0138,

Proposed Order, 2010 WL 4912327 (October 7, 2010) (declining to assert authority to require billing insert).

In the normal course of its regulatory authority, the regulator may require the utility to disclose matters that it may prefer not to disclose. Indeed, by extension under Ameren's logic, it should not have to post a rate schedule or get approvals for rate changes if it disagrees with the Commission's findings. Whether a utility agrees or not, required disclosures and transparency is a critical aspect of ensuring that rates are just and reasonable. The suggestion that such basic disclosures are akin to forcing a utility to use its property to promote another entity's interest does not comport, particularly when it is the utility itself that is voluntarily initiating the donation, as well as its treatment as an operating expense, in the first place, as would be the case here.

Aside from these clear reasons to deny the motion, the complex nature of a rulemaking proceeding in and of itself does not lend itself well to limited discussion of oral argument. It would be a painstaking exercise to debate the particulars of a proposed rule's strike-out language, when it can be assessed from what is already in the record as it is here. An oral argument would not add new insights at this late juncture. As a result, additional argument here would be administratively inefficient. Given the extensive workshops that have been held and the comments that have been provided, there is nothing to be gained by further delay with respect to the proposed rule at issue. As such, Staff recommends that the request for oral argument in this matter be denied.

IV. MOTION FOR STAY

While it is clear that the issues addressing the current language in Section 9-227 have been exhaustively addressed in this docket through workshops, comments, hearing, and briefs, Staff recognizes the existence of pending legislation before the General Assembly, S.B. 2028, proposing to amend Section 9-227 of the Public Utilities Act, 220 ILCS 5/9-227, which may, if adopted, necessitate further comment or workshops solely on any resulting new discrete issues or statutory language.

In order to avoid the potential need to start the process over in the event of a statutory amendment, therefore, and pursuant to Section 200.190 of the Commission's Rules, 83 IL Adm Code 200.190, Staff moves for a stay of the proceeding pending the outcome of the pending resolution of S.B. 2028, proposed legislation to amend Section 9-227 of the Public Utilities Act, currently before the General Assembly, which could have an impact on this rulemaking. Specifically, in an effort to avoid prematurely moving into the First Notice period, which would begin the one-year statutory clock to run pursuant to 5 ILCS 100/5-40(e), Staff recommends holding this matter in abeyance pending the outcome of the proposed amendments to Section 9-227, to determine whether additional workshops or comments may be necessary to address any new language that may be added to Section 9-227, the subject of this proceeding. See, Illinois Commerce Commission on its own Motion, Order, Docket No. 89-0125, (November 7, 1995) (docket held in abeyance pending resolution of a related complaint; Docket No. 88-0412 also held in abeyance pending resolution of statewide investigation).

V. CONCLUSION

WHEREFORE, for the reasons set forth above, Staff respectfully requests that the Commission's Final Order in the instant proceeding reflect Staff's recommendations consistent with this Reply Brief on Exceptions, as well as those in Staff's previously filed Initial Brief, Reply Brief and Brief on Exceptions. Staff also requests that the Commission deny Ameren's request for oral argument and stays this proceeding pending the resolution of S.B. 2028 in the current legislative session.

Respectfully submitted,

/s/

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